COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

PLYMOUTH COUNTY NO. 2015-P-1027

COMMONWEALTH

V.

ADMILSON RESENDE

BRIEF FOR THE DEFENDANT
ON APPEAL FROM A JUDGMENT
OF THE PLYMOUTH SUPERIOR COURT

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ISSUES PRESENTED

1. Whether, pursuant to Commonwealth v. Scott, 467 Mass. 336 (2014), the defendant is entitled to a conclusive presumption that egregious government misconduct occurred in his case where, although Annie Dookhan did not sign the drug certificate as an assistant analyst, it is undisputed that she was responsible for performing all confirmatory testing tasks as to which she admitted having engaged in misconduct, including tuning and calibrating the gas chromatography/mass spectrometer ("GC/MS") machine, verifying that the machine was functioning properly, and setting up and running the actual GC/MS tests.

2. Whether the magistrate erred in concluding that knowledge of Dookhan's misconduct would not likely have made a difference to the defendant's decision to plead guilty, where the defendant had never before been convicted of a crime and received no consideration from the Commonwealth in exchange for his plea.

STATEMENT OF THE CASE

On November 9, 2006, a Plymouth County grand jury returned indictment PLCR2006-00560, charging Admilson Resende with five counts of distribution of cocaine, see G.L. c.94C, §32A(c) (counts 1, 3, 5, 7, and 8), three of which carried "school zone" enhancements, see

G.L. c.94C, §32J (counts 2, 4, and 6); one count of possession of cocaine with intent to distribute, see G.L. c.94C, §32A(c) (count 9); and one count of possession of marijuana, see G.L. c.94C, §34 (count 10). R. 5-14.[1/] The defendant pleaded not guilty. R. 1.

On January 23, 2007, following a colloquy with Justice Ball in Brockton Superior Court, the defendant changed his pleas on counts 1 through 9 of the indictment to guilty. R. 1-2. The judge sentenced the defendant on counts 1, 3, 5, 7, 8, and 9 to concurrent terms of one year in the house of correction. R. 2. On counts 2, 4, and 6, she imposed sentences of two years in the house of correction, to run after the one-year sentence but concurrently with one another. R. 2. Count 10 was filed without a change of plea. R. 2.

On October 2, 2012, the defendant filed a motion to withdraw his guilty pleas pursuant to Mass.R.Crim.P. 30(b). R. 15. Special Judicial Magistrate Chernoff held a hearing on the motion on April 22, 2014. R. 3. The magistrate issued proposed rulings and an order denying the defendant's motion on May 12, 2014. R. 225. On May 14, the defendant notified the Regional Administrative Justice of his objection to the

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[1/]The record appendix, separately bound and filed with this brief, is cited as "R. __."

magistrate's proposed order. R. 244. On May 27, Justice Gaziano adopted the magistrate's proposed order and denied the defendant's motion. R. 248.

The defendant's notice of appeal was timely filed on May 30, 2014. R. 249. A malfunction in the Superior Court's recording equipment necessitated a motion to reconstruct the record, which the defendant filed on November 4, 2014. R. 4. After a hearing, that motion was allowed on December 15, 2014. R. 4. The parties filed a joint statement regarding counsel's recollection of the testimony at the hearing, which was endorsed by the magistrate. R. 250. The case was ultimately entered in the Appeals Court on July 23, 2015, as No. 15-P-1027.

STATEMENT OF FACTS

On August 22, 2006, defendant Admilson Resende was arrested by the Brockton police and charged with five counts of distribution of cocaine (three of which carried school zone enhancements), one count of possession of cocaine with intent to distribute, and one count of possession of marijuana. R. 5-14, 227. The distribution charges were based on five "controlled buys" conducted by a Brockton police officer. R. 226. The possession charges were based on substances found on the defendant's person when he was arrested. R. 227.

The substances obtained from the defendant were sent by police to the Hinton drug lab in Jamaica Plain for testing. R. 227. The lab eventually produced seven certificates of drug analysis, which were provided to the defendant in discovery. R. 227. The certificates purported to confirm that the substances forming the bases of counts one through nine were, in fact, cocaine. The certificate relating to counts one and two (charging distribution in a school zone) was signed by chemists Daniela Frasca and Annie Dookhan. R. 79. The certificates relating to counts three through seven (charging three additional counts of distribution, two of which were subject to school zone enhancements) were signed by Frasca and Michael Lawler. R. 80-82. The certificates relating to counts eight and nine (the final distribution count and the charge of possession with intent) were signed by chemists Kate Corbett and Della Saunders. R. 83-84.

The defendant's attorney, Jane Peachy, viewed the certificates as essentially unimpeachable evidence of the nature of the substances at issue. R. 75. She advised the defendant that he had no viable trial strategy. R. 77. This being the case, and in light of the fact that the defendant had no prior adult convictions and had never before been sentenced to a

term of incarceration, Attorney Peachy advised him to plead guilty and request the mandatory minimum sentence. R. 77.

On January 23, 2007, in an un-agreed tender, the defendant changed his pleas on counts 1 through 9 to guilty. R. 1-2. He requested the mandatory minimum sentence of one year in the house of correction for the counts of distribution of cocaine and possession with intent to distribute, to be followed by two years in the house of correction on the school zone enhancements. The Commonwealth did not reduce or dismiss any of the charges, and sought a sentence of four to six years in state prison. R. 76. The judge agreed with the defendant's request, and imposed the mandatory minimum sentence of, effectively, three years in the house of correction. R. 2.

In the summer of 2012, state officials announced that the Governor had ordered the Hinton lab to be shut down because of widespread misconduct at the lab, chiefly by chemist Annie Dookhan. R. 34. On October 12, 2012, the defendant moved to withdraw his guilty pleas, arguing that they were involuntary because they had been induced by government misconduct. R. 15.

On April 1, 2013, the defendant moved for the production of drug analysis documentation for the

samples in his case. R. 2. The court allowed the motion and ordered the production of the records, which revealed that although chemist Michael Lawler had signed the drug certificates relating to counts three through seven of the indictment, Annie Dookhan had actually been responsible for setting up and running the confirmatory testing on those samples. R. 234; see R. 120, 123, 133-160 (showing initials "ASD" as "operator"). Thus, Dookhan had run the confirmatory tests on the samples relating to four of the five distribution counts, including all three of the counts carrying school zone enhancements.

A hearing was held on the defendant's motion on April 22, 2014. The only witness at the hearing was Michael Lawler, the chemist who had signed three certificates based on tests run by Dookhan. Lawler testified that the Hinton lab's procedures required suspected cocaine to undergo two phases of testing. R. 250. First, the "primary chemist" would perform preliminary bench top tests. Id. These tests can be "discretionary, based on the subjective interpretation of the individual chemist." Id. The primary chemist would then prepare an aliquot -- a small portion of the sample in a solvent -- for confirmatory testing. R. 251.

The confirmatory testing was accomplished through

use of a gas chromatography/mass spectrometer ("GC/MS") machine. R. 230. The GC/MS machine contained a carousel which could be loaded with up to 100 vials, which would then be tested in sequence during a single "run" of the machine. R. 252. The chemist assigned to run the confirmatory tests would be responsible for "test preparation, and quality control to ensure that the machine was operating properly." R. 253. Prior to each run of the machine, the chemist would have to "tune" the instrument, particularly the mass spectrometer, to make sure it was operating properly. Id.

If the machine was working properly, the chemist would load the vials into the machine, document their placement, and run the machine. R. 252. The GC/MS machine would produce reviewable data that the chemists referred to as "documentation." R. 233. After the GC/MS run was complete, the chemist would analyze the documentation, comparing data from vials containing known substances (in this case, cocaine) against data from the substances being tested to see if they matched. R. 254. Lawler emphasized that the confirmatory testing process was different than the preliminary tests because the confirmatory tests were "non-discretionary" and "there was no creativity with the GC/MS testing process." R. 251.

As to the testing in the defendant's case, Lawler testified that the samples underlying the certificates he had signed had all been analyzed during a single run of the GC/MS machine, beginning on October 6, 2006. R. 255. Annie Dookhan prepared that run; she thus would have been responsible for any necessary quality control, and for ensuring that the machine was operating properly prior to the run. Id. Lawler testified that the GC/MS testing process can be lengthy, and it was not unusual for a run to be started one work day, to be finished either during the night or the following morning. R. 256. Based on the GC/MS documentation from this case, Lawler testified that the sequence in question was initiated by Dookhan at 10:21 A.M. on October 6, 2006, and was completed at 7:25 A.M. on October 7, 2006. Id. Lawler reviewed the data from this run on October 7, and ultimately signed the certificates based on the documentation produced during the course of the run. R. 256-257.

ARGUMENT

THE DEFENDANT MUST BE ALLOWED TO WITHDRAW HIS GUILTY PLEAS BECAUSE ANNIE DOOKHAN EFFECTIVELY SERVED AS THE CONFIRMATORY CHEMIST ON ALL OF THE LEAD CHARGES IN HIS CASE, AND THE DEFENDANT WOULD NOT HAVE PLEADED GUILTY HAD HE KNOWN OF DOOKHAN'S MISCONDUCT.

This is the latest in a series of cases involving the consequences of pervasive, egregious misconduct by

Annie Dookhan, who was employed as a chemist at the Hinton drug lab from 2003 until 2012. Dookhan acted, at various times, as both a primary and a confirmatory chemist, and she admitted to misconduct in both roles. See Commonwealth v. Scott, 467 Mass. 336, 353 n.9 (2014). In her role as a confirmatory chemist, her admitted misconduct included failure to verify the proper functioning of the GC/MS machine and forgery of reports to hide that failure. Id. at 340. She ultimately pleaded guilty to twenty-seven charges arising out of her misconduct, including perjury and evidence tampering. See id. at 337 & n.3.

In Commonwealth v. Scott, the Supreme Judicial Court addressed the problem of guilty pleas tendered based in part upon chemical analyses performed by Dookhan. As the Court recognized, "[d]ue process requires that a plea of guilty be accepted only where 'the contemporaneous record contains an affirmative showing that the defendant's plea was intelligently and voluntarily made.'" Scott, 467 Mass. at 345, quoting Commonwealth v. Furr, 454 Mass. 101, 106 (2009). Where a plea "was involuntarily induced by government misconduct that since has been discovered," the Constitution requires the defendant to be permitted to withdraw the plea. Id. at 345-346.

Scott established a two-prong framework for evaluating motions to withdraw guilty pleas based on Dookhan's misconduct. To prevail on such a motion, the defendant first must show that egregious government misconduct occurred in his case prior to the entry of his guilty plea. Second, the misconduct must have influenced the defendant's decision to plead guilty. Id. at 346, citing Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006). In this case, the magistrate concluded that the defendant had failed to establish either requirement. He was wrong on both counts.

A. The defendant is entitled to a conclusive presumption of government misconduct where Annie Dookhan was responsible for all of the confirmatory testing tasks as to which she admitted having engaged in misconduct.

The first prong of the Scott analysis requires a defendant to "show a nexus between the government misconduct and the defendant's own case." Id. at 351. However, the Court recognized in Scott that although it is "reasonably certain" that Dookhan's "misconduct touched a great number of cases," it will be largely impossible to show whether or not she engaged in misconduct in any one case in particular; even Dookhan herself cannot say which of the thousands of tests she performed were tainted by her misconduct. Id. at 351-352. The Court's solution was to hold that where a

defendant seeking to withdraw a guilty plea "c[an] show that Dookhan was one of the chemists assigned to his case, the defendant [is] entitled to a presumption of government misconduct in the consideration of his motion to withdraw the plea." Commonwealth v. Curry, 88 Mass. App. Ct. 61, 63 (2015).

The defendant in this case did show that Dookhan was one of the chemists assigned to his case. As to the first two counts of the indictment, she signed the drug certificate as the confirmatory chemist. R. 79. As to counts three through seven, she performed most of the duties of the confirmatory chemist, including "tuning" the GC/MS machine, preparing it for its run, and running the test itself. R. 234. However, the magistrate concluded that the defendant was not entitled to a presumption of misconduct as to those latter counts because Dookhan had not ultimately signed the drug certificates for those samples. R. 236-237. This was error.

The Supreme Judicial Court's holding in Scott did mention the proffer of "a drug certificate from the defendant's case signed by Dookhan on the line labeled 'Assistant Analyst.'" 467 Mass. at 352. However, the reason for this narrow focus was that "it appear[ed] from the record [in Scott] that the only reliable and

available basis from which a defendant could even begin to assess whether Dookhan's wrongful conduct touched the defendant's case is whether Dookhan signed the drug certificate in her role as an analyst in that defendant's case." Id. at 353. The relevant question is whether Dookhan was involved in testing the drugs (and thus, whether she may have engaged in misconduct during the testing process). The signature on the certificate was merely the best proxy for this question that was apparent on the record in Scott.

As this case demonstrates, however, Dookhan's signature on a drug certificate is not the only way to establish that she was responsible for testing in a particular case. The underlying lab documentation shows that she set up and ran the confirmatory testing in this case, while Michael Lawler -- who signed as the "confirmatory chemist" -- merely reviewed the documentation printed out by the GC/MS machine and certified that the readout for a "known" sample of cocaine appeared to match the readout for the "unknown" sample being tested. See R. 234-235 (magistrate's findings); R. 257 (Lawler's testimony); R. 120, 123, 133-160 (underlying documentation).

A review of the Scott decision reveals that the Supreme Judicial Court, in fashioning its holding in

that case, was operating under the assumption that all of the confirmatory chemist's duties were carried out by the same chemist in each case.[2/] This is unsurprising; as the magistrate recognized, the Hinton lab's chemists generally "represented in court that they used a two-chemist system [i.e., one primary and one confirmatory chemist] when testing substances." R. 231. The Court's intention in limiting the presumption of misconduct to "cases in which [Dookhan] served as either the primary or secondary chemist," 467 Mass. at 341, was to capture those cases where she was involved in testing the drugs. This is plainly such a case.

The magistrate, throughout his order, draws a marked distinction between the roles of what he terms the "setup operator" (Dookhan) versus the "confirmatory chemist" (Lawler). R. 232-234, 236-237. There appears to be no basis in the record before the magistrate for such a distinction. From all that appears in the record, the duties performed by Dookhan in this case, however labeled, were duties assigned to the confirmatory chemist. Indeed, the record in this case contains documents (referred to by the magistrate in his order,

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[2/]See Scott, 467 Mass. at 340 ("a chemist serving as a secondary or confirmatory chemist was responsible for carrying out the secondary tests and for verifying the proper functioning of the GC-MS machine prior to each 'run' of samples through the machine").

R. 238 at n.24) listing ten discrete tasks for which a confirmatory chemist was responsible. R. 203-224. In this case, Dookhan was responsible for performing nine of these ten tasks; the only one performed by Lawler was the final step of "[c]ompar[ing] data from each unknown sample to a known standard to determine if there is a match." R. 204; see R. 256-257.

The magistrate nevertheless sharply distinguished between Dookhan's responsibilities and Lawler's in this case, claiming that Dookhan "had a lack of sovereignty" because she was only "tasked with setting up the GC/MS machine, which would then run itself." R. 237. In the magistrate's view, Lawler "used his discretion whereas [Dookhan] did not." Id. The record does not support this assertion. There is no indication that the final step of the confirmatory testing process required the chemist's "discretion," rendering it subject to concerns about potential misconduct, while the earlier stages, including tuning and calibration of the GC/MS instrument, did not. Indeed, Lawler testified that the confirmatory testing process as a whole was "non-discretionary" and that "there was no creativity with the GC/MS testing process." R. 251. There is no reason to believe that the final step of confirmatory testing is the only step subject to concerns about

misconduct. It would be at least as sensible to conclude that the final step is the one least susceptible to such concerns, since the machine-generated documentation can be double-checked at any time.

In point of fact, the stages of the confirmatory testing process at which Dookhan's admitted misconduct occurred were the very stages for which she was responsible in this case. The Supreme Judicial Court specifically noted that "Dookhan's misconduct likely occurred ... while conducting confirmatory tests using the gas chromatography-mass spectrometer machine," 467 Mass. at 353 n.9 (emphasis supplied), not while analyzing the data generated by the machine. More specifically, her admitted misconduct as a confirmatory chemist consisted of the "failure to verify the proper functioning of the GC-MS machine" and forgery of reports to hide that failure. Id. at 341.

In this case, it was Dookhan's responsibility to "verify the proper functioning of the GC-MS machine." Id. This was the very task that she admitted to having lied about properly performing -- the misconduct which the Supreme Judicial Court deemed sufficiently egregious to warrant a finding in a defendant's favor on the first prong of the Scott test. There has never been any indication that Dookhan ever committed misconduct

in the final step of the confirmatory testing process (the only step performed by Lawler in this case).

The magistrate's conclusion below is impossible to square with the Supreme Judicial Court's reasoning in Scott. Effectively, the magistrate held that so long as another chemist was responsible for reviewing the data produced by the GC/MS machine, tests run by Dookhan could be relied upon. Were this the case, there would be no need for a presumption of misconduct in cases where Dookhan served as the confirmatory chemist; the GC/MS documentation could simply be reviewed by another chemist at the time a defendant moved to withdraw a guilty plea.

The Supreme Judicial Court has made clear, however, that the risk that Dookhan failed to properly verify the functioning of the GC/MS machine before running confirmatory tests renders those tests untrustworthy. The defendant is no more able to determine whether Dookhan followed protocols correctly in this case than he would be had she ultimately signed the drug certificates. "[I]n the wake of government misconduct that has cast a shadow over the entire criminal justice system, it is most appropriate that the benefit of [the] remedy inure to defendants." Scott, 467 Mass. at 352. The defendant is "entitled to a conclusive

presumption that egregious government misconduct occurred" in the analysis of the samples underlying the first seven counts of the indictment. Id.

B. Had the defendant known of Dookhan's misconduct, he would not have pleaded guilty to all charges without any consideration from the Commonwealth.

The second prong of the Scott test requires the defendant to "demonstrate a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct." 467 Mass. at 355. This is a "totality of the circumstances" test, and the analysis is to be "based on the actual facts and circumstances surrounding the defendant's decision at the time of the guilty plea in light of the one hypothetical question of what the defendant reasonably may have done if he had known of Dookhan's misconduct." Id. at 357. The "actual facts and circumstances" in this case undisputedly involved a nineteen-year-old defendant with no prior criminal record pleading guilty to nine felony charges without any consideration from the Commonwealth because he believed he had no viable litigation strategy. The magistrate nevertheless held that knowledge of egregious misconduct at the Hinton lab would have had no bearing on the defendant's decision to plead guilty. This conclusion was flawed in several respects.

The magistrate pointed to only two factors in deciding that the defendant was not prejudiced by Dookhan's misconduct: additional circumstantial evidence that the substance the defendant distributed was cocaine, and "the benefit the defendant received by entering a guilty plea." R. 240-241. Inexplicably, however, the magistrate either overlooked or ignored the fact that there was no plea bargain in this case. The defendant tendered an un-agreed guilty plea, receiving no consideration from the Commonwealth in exchange. Not only did the Commonwealth refuse to reduce or dismiss any of the charges, the prosecutor urged the judge to sentence the defendant to four to six years in state prison instead of the three years in the house of correction requested by the defendant. R. 76.

In light of this fact, the magistrate's conclusion that the defendant received a substantial benefit from pleading guilty does not stand up even to passing scrutiny. Notably, at the time he tendered his plea, the defendant was nineteen years old, and had never before been convicted of a crime or sentenced to incarceration. R. 77. Under those circumstances, the risk was minimal that the defendant -- even had he been convicted on all charges at trial -- would have received a substantially greater sentence than the

mandatory minimum of three years in the house of correction. Indeed, the sentencing guidelines would have called for a maximum sentence of no more than two years.[3/] As he argued in his motion, had the defendant known of Dookhan's misconduct, he would have had "nothing to lose but everything to gain" by going to trial. R. 63.

The magistrate's conclusion that Dookhan's misconduct did not "substantially weaken the factual basis of the drug-related charges" (R. 240) is likewise unsupportable. Dookhan effectively served as the confirmatory chemist for four of the six cocaine samples tested at the Hinton lab, including those related to all three of the lead charges (the school zone charges). As in Scott, "where [the defendant] was charged solely with drug [offenses] and no other crimes, the drug certificate[s] [were] central to the Commonwealth's case, and an affirmative misrepresentation on the drug certificate may have undermined the very foundation of [the defendant's] prosecution."

[3/]The governing offense in this indictment, distribution of cocaine in a school zone, has been assigned a seriousness level of 4. See Massachusetts Sentencing Commission, Felony & Misdemeanor Master Crime List at 20-21 (2013). This would have placed the defendant in the Discretionary Zone on the sentencing guidelines grid, with a maximum sentence range of zero to twenty-four months. Because there were no aggravating factors in his case, the only appropriate guidelines sentence after trial would have been the sentence that the defendant received -- the mandatory minimum.

467 Mass. at 348.

Had the defendant known of Dookhan's misconduct, he could have moved to exclude the chemical testing of those substances as unreliable. See, e.g., Commonwealth v. Pitts, 87 Mass. App. Ct. 1139 (2015) ("Because of chemist Annie Dookhan's involvement in the testing of the substance seized from the defendant's residence, the judge excluded as unreliable the results of the laboratory testing"). The defendant also could have made use of Dookhan's misconduct at trial to impeach all potential testimony from chemists at the Hinton lab, including testimony regarding the two samples that Dookhan did not test. "[P]roof of Dookhan's wrongdoing as it related to the defendant's case provides its own shadow of reasonable doubt about the nature of the substances tested." Commonwealth v. Gaston, 86 Mass. App. Ct. 568, 574 (2014).

It is true, as the magistrate noted (R. 240), that other circumstantial evidence of the nature of the substance would potentially have been available at trial. However, "[o]nly the confirmatory chemist uses sophisticated instrumentation in the testing process that has both a high discriminatory power to identify the substance and the ability to produce instrument-generated documentation of test results." Gaston, 86 Mass. App. Ct. at 574. The magistrate found it significant that the detective field tested substances after

receiving them from the defendant, but like a primary chemist's bench top tests, "it is far from clear that such tests are sufficiently reliable to be admitted" on their own. Id. See Commonwealth v. Fernandez, 458 Mass. 137, 151 n.20 (2010) ("to date, no appellate case from Massachusetts has accepted as reliable field test results, regardless of the purpose for which they are offered").

As both the defendant and plea counsel explained in their affidavits, the only reason that the defendant pleaded guilty was that he "believed that he did not have a viable trial strategy." R. 74, 77. Without knowledge of the egregious government misconduct that occurred in his case, there was simply nothing to litigate. However, had the defendant known of Dookhan's misconduct at the time, he would have had multiple possible avenues of litigation. As both the defendant and plea counsel averred (R. 74, 77), he would have pursued those avenues rather than simply pleading guilty to all charges without receiving anything in exchange.

Under the circumstances, the magistrate's conclusion that a "decision not to plead guilty would [not] have been rational under the circumstances" (R. 241) cannot be sustained. In point of fact, had the defendant been aware in 2007 of the egregious

misconduct occurring at the Hinton lab, it would have been irrational for him to simply plead guilty to all charges without attempting to litigate the admissibility of the chemical testing evidence. At the very least, such litigation would have put the defendant in a position to extract a much more favorable plea agreement (i.e., an agreement of any kind) from the Commonwealth. See Commonwealth v. Clarke, 460 Mass. 30, 47 (2011) (defendant must be permitted to withdraw plea if "there is a reasonable probability that a different plea bargain ... could have been negotiated").

CONCLUSION

For the reasons stated supra, the order denying the defendant's motion to withdraw his guilty pleas must be reversed, and a new order entered allowing the motion.

Respectfully submitted,

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ADDENDUM

5/12/14

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2006-00560

FILED
COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPT. OF THE TRIAL COURT
PLYMOUTH COUNTY
MAY 12 2014
Clerk of Court

COMMONWEALTH

vs.

ADMILSON RESENDE

PROPOSED RULINGS AND ORDER ON DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA

On January 23, 2007, the defendant, Admilson Resende, pleaded guilty to five counts of distribution of cocaine, one count of possession with the intent to distribute cocaine, and three counts of distribution in a school zone. The Commonwealth placed a tenth count, possession of marijuana, on file. The defendant was sentenced to one year in the house of correction for each count of distribution of cocaine, to be served concurrently, and two years in the house of correction on each of the school zone charges, to be served concurrently and from and after the distribution and possession with intent to distribute sentences. He has served the sentences. On October 2, 2012, the defendant moved to withdraw his guilty plea primarily on grounds that Annie Dookhan's role as the chemist assigned to setup and operate the Gas Chromatography/Mass Spectrometry machine (the "setup operator") warranted a finding of "egregious misconduct" and that the defendant would not have pleaded guilty had he had knowledge of that misconduct at the time. This Court held a hearing on April 22, 2014. For the reasons stated herein, the Court's proposed order is that the Motion to Withdraw the Defendant's Guilty Plea Under Rule 30 is hereby **DENIED**.

BACKGROUND

On November 9, 2006, a Plymouth County Grand Jury issued indictments charging the defendant with unlawful distribution of cocaine (2006-00560-001), unlawful distribution in a school zone (2006-00560-002) ("school zone charge"), unlawful distribution of cocaine (2006-00560-003), unlawful distribution in a school zone (2006-00560-004), unlawful distribution of cocaine (2006-00560-005), unlawful distribution in a school zone (2006-00560-006), unlawful distribution of cocaine (2006-00560-007), unlawful distribution of cocaine (2006-00560-008), possession of cocaine with intent to distribute (2006-00560-009), and possession of marijuana (2006-00560-010).

I. Facts Underlying the Indictments

On August 7, 2006, Detective Stanton of the Brockton Police Department applied for a search warrant for 589 North Montello Street, Apartments 1 and 2, Brockton, based on four controlled buys of class B narcotics (cocaine) in school zones and a park. Ex. 9; Ex. 10. These four controlled buys took place on August 5, 2006, August 7, 2006, August 11, 2006, and August 14, 2006. Ex. 10. Each buy occurred in a similar manner; Det. Stanton would call a phone number provided by the defendant and meet him or one of his counterparts at the corner of North Montello Street and King Avenue at the A1 Prime Gas Station. Id. Det. Stanton would then purchase a "forty" bag or two "twenty" bags[1] of an off-white, rock-like substance from the defendant. Id. The defendant was observed leaving and reentering 589 North Montello Street before and after the buys took place. Id. After Det. Stanton completed each controlled buy, the substance was field-tested and tested positive for cocaine. Ex. 9; Ex. 10.

[1] The street term "forty" refers to forty dollars worth of cocaine, and "twenty" refers to twenty dollars worth of cocaine.

The warrant was granted on August 17, 2006, and executed on August 22, 2006. Id. On August 22, 2006, Det. Stanton engaged in a fifth controlled buy with the intention of executing the search warrant immediately thereafter. Id. Det. Stanton called the defendant, who directed him to North Montello Street and King Avenue. Id. This location was within 1000 feet of St. Edward Elementary School. Id. The defendant advised Det. Stanton that he would meet him with a "forty" bag instead of two "twenty" bags. Id. When Det. Stanton arrived, he called the defendant and observed him leave 589 North Montello Street. Id. Upon meeting the defendant, Det. Stanton gave the defendant two twenty-dollar bills with recorded serial numbers in exchange for a clear plastic bag containing an off-white rock-like substance. Id. After the buy was complete, a take-down team secured the defendant and took him into custody. Id.

After the defendant was secured, the search warrant team executed the warrant and secured the premises. Id. Detective Lieutenant Lafratta advised the defendant of his *Miranda* rights, which the defendant acknowledged he understood in clear spoken English. Id. A Nextel phone was recovered from the defendant's person. Id. Trooper Walls located three off-white rock-like substances each wrapped in clear plastic, a bag containing a green herb, and two twenty-dollar bills with recorded serial numbers in the defendant's front right pant pocket. Id.

II. Results of the Substance Testing

The substances recovered from the four controlled buys and from the defendant's person were sent to the William A. Hinton State Laboratory Institute ("Hinton Lab") for chemical analysis. Ex. 1; Ex. 2; Ex. 3; Ex. 7; Ex. 8. As a result of this analysis, the Hinton Lab generated seven signed and notarized certificates of drug analysis. Ex. 1; Ex. 2; Ex. 3; Ex. 7; Ex. 8. Sample 779125 was analyzed on October 7, 2006, and was found to contain cocaine, with a net

weight of .20 grams.[2] Ex. 1. Weighing and primary testing was performed by chemist Daniela Frasca, with confirmatory testing by chemist Michael Lawler. Id. Sample 779099 was analyzed on October 7, 2006, and was found to contain cocaine, with a net weight of .18 grams.[3] Ex. 2. Weighing and primary testing was performed by Frasca, with confirmatory testing by Lawler. Id. Sample 779110 was analyzed on October 7, 2006, and was found to contain cocaine, with a net weight of .19 grams.[4] Ex. 3. Weighing and primary testing was performed by Frasca, with confirmatory testing by Lawler. Id. Sample 810300 was analyzed on October 13, 2006, and was found to contain cocaine, with a net weight of .54 grams.[5] Ex. 7. Weighing and primary testing was performed by chemist Kate Corbett, with confirmatory testing by chemist Della Saunders. Id. Sample 810301 was found to contain cocaine and was comprised of one plastic bag with a net weight of .47 grams. Id. Weighing and primary testing was performed by Corbett, with confirmatory testing by Saunders. Id. Sample 810302 was found to contain marijuana in one plastic bag. Id. Testing was performed by Saunders. Id. Sample 810059 was analyzed on October 5, 2006, and was found to contain cocaine, with a net weight of .21 grams.[6] Ex. 8. Weighing and primary testing was performed by Frasca, and confirmatory testing was performed by Dookhan. Id.

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[2] Two items were received, but only one was randomly selected and analyzed.

[3] Two items were received, but only one was randomly selected and analyzed.

[4] Two items were received, but only one was randomly selected and analyzed.

[5] Three items were received, but only one was randomly selected and analyzed.

[6] Two items were received, but only one was randomly selected and analyzed.

Dookhan subsequently admitted to tampering with samples to increase the weight, dry-labbing,[7] failing to comply with quality control procedures, forging the initials of other chemists, and adding narcotics to samples that originally tested as negative for drugs. She is currently serving a sentence for perjury and various misdeeds she committed in connection with specific cases she worked on during her employment at the Hinton Lab.

III. Hearing on the Defendant's Motion to Withdraw Guilty Plea

At the April 22, 2014, hearing on the defendant's Motion to Withdraw Guilty Plea, the parties presented several exhibits, including the drug certificates for samples 779125, 779099, and 779110 (Ex. 1; Ex. 2; Ex. 3), the lab documentation for samples 779125, 779099, and 779110 (Ex. 4), the Inspector General's Report (Exs. 5, 5A), a copy of Det. Irwin's interview with Annie Dookhan (Ex. 6), the drug certificate and accompanying lab documentation for samples 810300, 810301, and 810302 (Ex. 7), the drug certificate and accompanying lab documentation for sample 810059 (Ex. 8), the arrest report (Ex. 9), and the affidavit in support of the search warrant (Ex. 10).

The defense also presented the testimony of chemist Michael Lawler, the confirmatory chemist on samples 779125, 779099, and 779110. Dookhan was the setup operator for samples 779125, 799099, and 779110. Ex. 4. Lawler testified about the Gas Chromatography/Mass Spectrometry machine (the "GC/MS machine") and the duties and responsibilities of the setup operator, a primary chemist, and a confirmatory chemist.

[7] Dry-labbing is a process by which a chemist conducts no actual testing and instead makes an identification of the substance based on its appearance.

IV. Testing Procedures at the Hinton Lab

A. Operation of the Gas Chromatography/Mass Spectrometry Machine

When a police agency brought a substance to the Hinton Lab for testing, the sample would be received by an evidence officer. Ex. 5 at 54. When the sample was accepted for testing, it would be assigned a sample number, which followed the sample through all phases of testing. Id. The evidence officer would generate a drug receipt with the sample number, and provide a copy to the police agency. Id. The evidence officer would then generate a control card,[8] and place the card and the substance into a manila envelope labeled with the sample number. Id. Eventually, the substance would be transferred to a chemist for testing. Id.

The Hinton Lab followed the SWGDRUG[9] protocol when testing substances, a two-step procedure that relied on the use of the GC/MS machine.[10] At the Hinton Lab, the room housing the GC/MS machines (the "GC/MS room") was located in the middle of the complex in a room accessible by only one door. There were five GC/MS machines located in the room, in addition to bookcases that held the vials of samples to be tested.

The GC/MS machine was large and box-shaped with a robotic arm. The robotic arm had a syringe attached to the end of it. Inside the GC/MS machine was a carousel, which could be loaded with 100 to 120 vials, depending on the size of the machine. When testing the samples, the robotic arm would reach down and puncture the top of each vial.

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[8] The control card accompanied the sample through all phases of the testing process, and listed information including the sample number, the identity of the chemists assigned to the sample, and the sample's net weight and analytical results.

[9] Scientific Working Group for the Analysis of Seized Drugs.

[10] The test is operated in two phases: the gas chromatography phase and the mass spectrometry phase. SWGDRUG standards actually state that use of the GC/MS machine alone is enough to determine the identity of the substance when a chemist uses the gas chromatography and the mass spectrometry as two separate and independent testing methods. The Hinton Lab utilized both phases, as well as preliminary bench testing.

The GC/MS machine was self-cleaning. After each vial was analyzed, the machine automatically purged the syringe by "spitting" its contents into a waste receptacle.

Though the Hinton Lab represented in court that they used a two-chemist system when testing substances, in actuality, the procedure was better described as a two-phase system.[11] Chemists were assigned to act as the setup operator for weeklong shifts. The setup operator had some level of autonomy, as he was not directly supervised, but a supervisor was usually present in the room.

B. The Two-Phase System

1. Preliminary Phase

Substances submitted by police agencies were assigned to a primary chemist for chemical analysis. Under the two-phase system, the primary chemist would be responsible for conducting the preliminary tests,[12] and would make a preliminary determination as to the identity of the substance. The primary chemist would then record these findings. Once he did so, he would prepare aliquots,[13] which were labeled with their corresponding sample number, for GC/MS analysis. Then, the primary chemist would prepare a GC/MS control sheet,[14] which listed the

[11] Under a two-chemist system, a primary chemist conducted the preliminary bench tests, and the confirmatory chemist would receive the sample into the GC/MS room, operate the GC/MS machine, and confirm the preliminary findings on the GC/MS machine. The Hinton Lab's procedure was more akin to a two-phase system, under which one chemist was responsible for the preliminary testing phase, and one or more chemists were responsible for the confirmatory phase, as on occasion, one chemist received the samples and operated the GC/MS machine and a second chemist analyzed the GC/MS testing results.

[12] The preliminary bench tests were known as the 'screening tests' and included color, microcrystalline, gas chromatography, infrared spectroscopy, ultraviolet spectroscopy, and macroscopic and microscopic tests.

[13] An aliquot is a small portion of the substance that the primary chemist placed into a small glass vial. The sample was dissolved in a solvent. The aliquot would then be transferred to the GC/MS room for testing.

[14] The control sheet included the date, the identity of the primary chemist, a list of samples in numerical order, the submitting police department, the preliminary findings, and any comments that would help the confirmatory chemist in his analysis.

numbers of the samples submitted, and submit it along with a control card and aliquots to the GC/MS room for the confirmatory phase.

2. Confirmatory Phase

The confirmatory testing phase involved three separate steps: receipt of the samples into the GC/MS room, operation of the GC/MS machine, and analysis of the GC/MS documentation to confirm the preliminary identification of the substances. The setup operator would be responsible for the first two steps, and the confirmatory chemist, who signed the drug certificate, was responsible for the last step.[15] In most cases, the setup operator became the confirmatory chemist, and would analyze the documentation when the GC/MS machine finished testing the run. However, sometimes the setup operator set the GC/MS machine to run overnight when the Hinton Lab was closed, and on occasion that setup operator was not the chemist present in the GC/MS room the next morning. In that situation, more than one chemist was involved in the confirmatory phase, as a different chemist analyzed the results and was designated the confirmatory chemist and signed the drug certificate.

In the confirmatory phase, a chemist would receive the vials containing aliquots from the primary chemist, and ensure that each vial number matched the sample numbers on the GC/MS control sheet and control card. The receiving chemist would acknowledge receipt of the vials and place them on the rack in the GC/MS room for analysis. The receiving chemist would fill out a sequence sheet,[16] an internal document that specified the order the aliquots, blanks,[17]

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[15] Chemists at the Hinton Lab did not see it as a requirement that these duties be performed by the same person.

[16] The sequence sheet was a separate document from the control sheet or the control card.

[17] Blanks were vials inserted between samples, which typically contained a solvent. Blanks were discarded after every run of the GC/MS machine. There is no standard across labs for how many blanks should be inserted between samples, but Lawler testified that the Hinton Lab inserted more than was customary.

standards,[18] and quality control standard mix[19] were to be tested. The aliquots were identified on the sequence sheet by their sample numbers. The setup operator did not open or prepare the aliquots; he simply arranged them on the GC/MS carousel.

Before the setup operator could start a run,[20] he was required to ensure the machine was ready for operation. To do so, he tuned[21] the machine to verify the mass spectrometer was working properly, confirmed that the GC/MS machine properly identified the quality control standard mix, and confirmed that the first few vials tested – standards and blanks – produced satisfactory data. The setup operator was also responsible for other quality control checks including checking the standard vials to make sure they were not contaminated. If the setup operator noticed that there were any artifacts in the blanks or standards, the setup operator was responsible for noting it and redoing the tune, due to the risk that carryover may have occurred. If at any point the setup operator noted the GC/MS machine was not fit for operation, he would terminate the run and restart the GC/MS analysis process. Additionally, the setup operator was responsible for performing maintenance and cleaning the GC/MS machine, including the syringe, as needed.

The GC/MS machine would produce reviewable data that the chemists referred to as documentation. After the GC/MS analysis was complete, the confirmatory chemist would check

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[18] The standard was a vial containing a known sample of the substance the samples for which the aliquots were being tested. In this matter, the standard was cocaine. Standards had a use life of several weeks, but they needed to be checked to ensure that no breakdown of the compound or contamination had occurred. If the standard became contaminated, it was replaced. If the setup operator noticed that the GC/MS machine had not identified the standard correctly, the entire run would be terminated. A new run would then be prepared using a new standard.

[19] The quality control standard mix was a vial containing a mixture of codeine and cocaine, and was used to ensure that the GC/MS instrument was operating properly.

[20] A 'run' was the term that Hinton Lab chemists used to refer to a group of aliquots, standards, blanks, and quality control blanks that were placed on the carousel and analyzed by the GC/MS machine in one batch.

[21] In order to tune the GC/MS machine, the machine would self-inject a stable compound, which it then identified. If the GC/MS machine did not produce an accurate reading from the compound, it needed to be tuned.

the order of the vials against the sequence sheet to ensure that they were analyzed in the correct order. He would then analyze the documentation in order to make an independent decision about the identity of the substance without using the primary chemist's notes. When he identified the substance, he would write it on the front of the control card and on the GC/MS control sheet. If there were ever an inconsistency between what the confirmatory and primary chemists identified the substance as, the primary chemist would be responsible for conducting further analysis or preparing a new aliquot.

C. Testing Practices at the Hinton Lab

It was a frequent practice for setup operators to set up a run later in the day, so that the GC/MS machine could run overnight and the results could be analyzed first thing the next day. However, regardless of when the run was completed, the confirmatory chemist reviewed the documentation and double-checked the order of the samples against the sequence sheet to ensure that it was processed correctly.

On many occasions, but not all, the setup operator became the confirmatory chemist after the run was completed. This depended on the day of the week and on whether the setup operator would be present in the lab the next day.

V. Testing in the Defendant's Case

In the instant case regarding samples 779125, 779099, and 779110, Dookhan, the setup operator, arranged the run on Friday afternoon and set it to be analyzed overnight by the GC/MS machine at the Hinton Lab. Due to the timing of when the run was set, Dookhan did not become the confirmatory chemist. Lawler, the confirmatory chemist, came in on Saturday morning and reviewed the GC/MS machine performance and analyzed the documentation.

Lawler testified that when he arrived on Saturday morning, he checked the vials against the sequence sheet to make sure they were in order. He also checked the machine to make sure there were no trouble signals, no jamming, and no loose vials. Lawler also stated that he would not have proceeded with his duties as confirmatory chemist if he found the vials were out of order.

Lawler testified that the GC/MS process overall was very "static," and there was no way to increase or accelerate the GC/MS process, procedures, or protocols, because review of the machine's documentation would have revealed such behaviors. Specifically, Lawler testified that there was "no creativity to" the GC/MS process. The GC/MS machine was a self-cleaning and self-purging machine. The amount of things one could do to tamper with the evidence in the GC/MS room was limited. Lawler, a very experienced chemist, has tried to fathom how a rogue person could, undetected, influence the results of the GC/MS machine. He concluded that he could not see how it could be done.

At the time these particular substances were analyzed, Dookhan had no responsibility for quality control standards in the Hinton Lab.

DISCUSSION

Mass. R. Crim. P. 30(b) permits a defendant to withdraw his guilty plea when justice may not have been done. Commonwealth v. Conaghan, 433 Mass. 105, 106 (2000). A court treats a motion to withdraw a guilty plea as a motion for a new trial and may allow it in the discretion of the motion judge. Id. Here, the defendant argues that justice was not done because as a result of Dookhan's misconduct, his guilty plea was not knowingly and voluntarily made. He asserts that the information is newly discovered exculpatory evidence that entitles him to a new trial, and the Commonwealth's failure to disclose information about Dookhan's actions was a violation of

Brady v. Maryland, 373 U.S. 83 (1963). Further, he asserts that due to Dookhan's misconduct, there is no factual basis to support his plea.

As a result of Dookhan's misconduct, and the plethora of legal issues that have ensued since its discovery, the Supreme Judicial Court, in Commonwealth v. Scott, 467 Mass. 336 (2014), put forth a two-prong test for determining whether a defendant can withdraw his guilty plea in a Hinton Lab-related matter. When a defendant seeks to withdraw his guilty plea, he must establish that "egregiously impermissible conduct . . . by government agents . . . antedated the entry of his plea and that the misconduct influenced his decision to plead guilty or, put another way, that it was material to that choice." Scott, 467 Mass. at 346, citing Ferrara v. United States, 456 F.3d 278, 290 (1st Cir. 2006). In a situation "where Dookhan signed the certificate of drug analysis as either the primary or secondary chemist . . . the defendant is entitled to a conclusive presumption that Dookhan's misconduct occurred in his case, that it was egregious, and that it is attributable to the Commonwealth." Scott, 467 Mass. at 338.

I. Dookhan's Role as the Setup Operator

Scott does not address whether a conclusive presumption of wrongdoing is available to a defendant when Dookhan was the setup operator. The SJC did ascribe the conclusive presumption of wrongdoing to instances when Dookhan was the confirmatory chemist. Based on the duties of the setup operator, the defendant argued that had the SJC known that Dookhan at times performed the role of setup operator, it would have incorporated this role into the presumption. This would expand Scott to include all segments of the confirmatory phase, instead of limiting the presumption to the role of the confirmatory chemist.

The language in Scott clearly limits the presumption to the role of confirmatory chemist, and this Court does not find that the roles of setup operator and confirmatory chemist were so

closely analogous that they should be treated as one under Scott. The duties of a setup operator and the duties of a confirmatory chemist did overlap, and in most cases, were performed by the same person, but they were not interchangeable. In fact, there were numerous key differences between the roles. The setup operator had a lack of sovereignty, and was tasked with setting up the GC/MS machine, which would then run itself. The confirmatory chemist, and not the setup operator, identified the substance and signed the drug certificate, and as such, the confirmatory chemist, and not the setup operator, was the one responsible for testifying in court. Overall, the confirmatory chemist used his discretion whereas the setup operator did not.

As the setup operator in this case, Dookhan would not have been responsible for testifying and did not have *any* say in the interpretation of the documentation or the identification of the substance. As the confirmatory chemist, Lawler was in charge of the process and charged with the responsibility of reviewing the operation of the GC/MS machine as well as the work Dookhan performed to set up the machine.

Further, while the SJC acknowledged that Dookhan had other roles at the Hinton Lab, it specifically declined to include them in the conclusive presumption.[22] See id. at 352 n.8. Additionally, the investigative report issued by the Office of the Inspector General indicated that the investigators found no evidence that Dookhan tampered with another chemist's samples. See Ex. 5 at 1. Accordingly, this Court will not expand Scott and find that the defendant is entitled to a conclusive presumption of wrongdoing in this case.

[22] In Scott, the SJC specifically declined to expand the conclusive presumption to cases in which Dookhan acted as the notary public. See Scott, 467 Mass. at 352 n.8. In doing so, the SJC stated that "[t]his rule does not extend, however, to cases in which Dookhan signed the drug certificate in her role as a notary public. The record does not contain any allegations of wrongdoing by Dookhan in certifying the signatures of other chemists in the lab or in any case in which she did not serve as the primary or confirmatory chemist." Id.

Though the defendant is not entitled to a conclusive presumption, he can still move to withdraw his plea under the modified two-part test that the SJC adopted from Ferrara. See Scott, 467 Mass. at 347, citing Ferrara, 456 F.3d at 290-291. First, the defendant must establish that "the guilty plea was preceded by 'particularly pernicious' government misconduct[.]"[23] See id. at 347, citing Ferrara, 456 F.3d at 291. Next, the defendant must show "that [the misconduct] was the source of the defendant's misapprehension of some aspect of his case." See Scott, 467 Mass. at 348, 350-351, citing Ferrara, 456 F.3d at 284, 290. Accordingly, this Court looks to whether the defendant has demonstrated that Dookhan, when acting as the setup operator in this case, engaged in 'particularly pernicious' misconduct, and that her misconduct was material to his guilty plea.

There is no evidence that Dookhan acted with purposeful malfeasance when acting as the setup operator in this particular matter. The records in this case indicate that she arranged the samples, recorded the order properly, and otherwise performed her duties as expected.[24] Further, it is important to note that it would be difficult, if not impossible, for a setup operator to engage in undetected purposeful malfeasance and neglect, as the confirmatory chemist performed various checks after GC/MS analysis was complete, including verification of the order of the samples and review of the documentation, which would reveal such malfeasance. Specifically in this matter, Lawler, the confirmatory chemist, testified that he verified that the vials were in the

[23] This Court assumes that Dookhan was acting as a government agent. See Scott, 467 Mass. at 348-350.

[24] The defendant submitted, as Exhibit E to his Supplemental Pleadings in Support of Motion to Withdraw the Defendant's Guilty Plea under Rule 30, a letter from the Scott appellate record. Attached to the letter is a printout entitled "Discovery Response – June 20 2013 – Overview of GC MS", which the letter states is contained in "Disclosure 10 of the CD-ROM HRA." The letter, written by a defense attorney on behalf of his client, summarizes the discovery response into a "task list" of responsibilities assigned to and performed by the setup operator. Though the discovery response detailed these tasks, the attorney's summary is not an official task list assigned by a laboratory to a setup operator. The letter and discovery response provide a useful supplement to Lawler's testimony about the setup operator's responsibilities.

proper order and that there was nothing in the documentation that indicated that the setup and operation of the GC/MS machine did not occur as it should have.

Further, this was not a case in which a setup operator also acted as the confirmatory chemist, or performed duties typically assigned to the confirmatory chemist in their stead. In this specific instance, Lawler, whom this Court finds was credible, testified that he confirmed that the GC/MS machine had identified the quality control standard mix as cocaine and codeine and the standard as cocaine, that the aliquots and blanks were in the correct order, and that the GC/MS machine otherwise appeared to be operating properly. Lawler confirmed the preliminary findings of Frasca, the primary chemist, after reviewing the documentation. Dookhan had no role other than as the setup operator.

Thus, the defendant has failed to meet his burden under the Ferrara analysis to show that Dookhan acted with 'particularly pernicious' misconduct in her role as a setup operator. See id. at 347, citing Ferrara, 456 F.3d at 290-291. Accordingly, the defendant may not withdraw his guilty plea on these grounds.

Assuming, however, that this Court were to allow the defendant to enjoy the conclusive presumption of egregious misconduct, the defendant still has not met his burden of proof under the second prong of Scott. The presumption does not "relieve the defendant of his burden . . . to particularize Dookhan's misconduct to his decision to tender a guilty plea." Scott, 467 Mass. at 354. The defendant still "must demonstrate a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct." Id. at 354-355. Further, he must convince the court that the decision to reject the plea bargain "would have been rational under the circumstances." Id. at 356, citing Commonwealth v. Clarke, 460 Mass. 30, 46-47 (2011) (internal quotations omitted).

In deciding whether a defendant has met his burden under the reasonable probability prong of Scott, a court should assess "the full context of the defendant's decision to enter a plea agreement." Scott, 467 Mass. at 357. The SJC identified numerous factors to aid in this assessment. Id. at 355-357. These factors include "whether evidence of the government misconduct could have detracted from the factual basis used to support the guilty plea, . . . whether the evidence would have influenced counsel's recommendation as to whether to accept a particular plea offer, and . . . whether the value of the evidence was outweighed by the benefits of entering into the plea agreement." Id. at 355, citing Ferrara, 456 F.3d at 290. "Ultimately, a defendant's decision to tender a guilty plea is a unique, individualized decision, and the relevant factors and their relative weight will differ from one case to the next." Scott, 467 Mass. at 355, citing Ferrara, 456 F.3d at 294.

Here, the factual basis for the plea was not substantially weakened by Dookhan's supposed misconduct in this case. The defendant pleaded guilty to six counts of distributing cocaine, and even if this Court assumes that Dookhan's misconduct touched four[25] of them, there was further evidence available for identifying the substances. Each sample was field-tested by Det. Stanton, who made a preliminary identification of alleged cocaine. Five of the samples were acquired through hand-to-hand buys, where Det. Stanton requested two "twenty" bags or a "forty" bag from the defendant, and it is logical to assume he received what he requested, and it was verified by the field-tests. As such, Dookhan's misconduct, even if it removed the evidentiary value of the drug certificates, did not substantially weaken the factual basis of the drug-related charges. There was substantial alternative evidence corroborating the identity of the substances. See Scott, 467 Mass. at 355.

[25] Dookhan acted as the setup operator for three of the cases and as the confirmatory chemist for the fourth.

Further, even if the evidence of Dookhan's misconduct weakened the factual basis of the charges, the value of that evidence still does not outweigh the benefit the defendant received by entering a guilty plea. When the defendant was sentenced, he received one year to the house of correction for each cocaine-related count, to be served concurrently. He was sentenced to two years on each school zone charge, to be served concurrently from and after his initial sentence, and the marijuana charge was filed. The defendant's resulting sentence was three years to the house of correction. However, if the defendant were permitted to withdraw his guilty plea, on charges (001), (003), (005), (007), (008), and (009), he would face two and one-half to ten years in state prison, or one to two and one-half years in the house of correction, for *each* charge. The school zone charges, (002), (004), and (006), *each* carry two and one-half to fifteen years in state prison, or two to two and one-half years in the house of correction, from and after. Further, the marijuana charge, (010), carries six months in the house of correction. Accordingly, had the case proceeded to trial, the defendant could have faced an aggregate sentence several times larger than his instant sentence and this would have influenced him not to risk trial.

When examined in the totality of the circumstances, the factors that other evidence of the identity of the substances exists and that the defendant received a substantial break in sentencing, leads to the conclusion that the defendant has not met his burden to show that there was a reasonable probability he would not have pleaded guilty had he known of Dookhan's misconduct. See id. at 354-355. Further, given these factors, the defendant has not shown that the decision not to plead guilty would have been rational under the circumstances. See id. at 356.

II. Dookhan's Role as a Confirmatory Chemist

Dookhan was the confirmatory chemist assigned to sample 810059. Thus, the defendant is entitled to the conclusive presumption that she engaged in egregious misconduct in regards to that sample alone. However, for many of the same reasons stated above, this Court concludes that the defendant has not met his burden under the second prong of Scott to demonstrate a reasonable probability that he would not have pleaded guilty had he been aware of this misconduct. See id. at 354-355. The defendant has further failed to show that the decision not to plead guilty would have been rational under the circumstances. See id. at 356.

As above, the factual basis underlying the charges and the plea was not substantially weakened by Dookhan's misconduct. There were alternative means of identifying the substances and five additional drug certificates from additional independent transactions that still provided a sufficient evidentiary basis to support the defendant's guilty plea. See id. at 355.

Further, the potential benefit of the evidence is substantially outweighed by the deal the defendant received in exchange for his guilty plea. As outlined above, the defendant received a substantial reduction in sentencing compared to what he would have been facing if he had proceeded to trial and been found guilty. If allowed to withdraw his plea in order to challenge the factual basis of only one charge, he would face significantly more time than he was sentenced to under the plea bargain. See id.

Accordingly, the defendant has not demonstrated a reasonable probability that he would not have pleaded guilty had he known of Dookhan's misconduct. See id. at 354-355. Further, in light of the substantial reduction in sentence that the defendant received and the relatively small role that Dookhan played in the case against the defendant, the decision to forgo the plea and

proceed to trial would not have been rational. See id. at 356. Therefore, the Motion to Withdraw the Defendant's Guilty Plea Under Rule 30 is hereby **DENIED**.

PROPOSED ORDER

For the foregoing reasons, the defendant's Motion to Withdraw Guilty Plea is **DENIED**.[26]

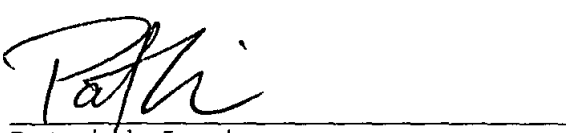
Judge Paul A. Chernoff (ret)
Judicial Magistrate

Date: May 12, 2014

[26] Pursuant to the Order of Assignment from Chief Justice Barbara J. Rouse, dated November 26, 2012, "If any party objects to the findings or rulings of the Special Judicial Magistrate, it must notify the Special Judicial Magistrate, opposing counsel and the Regional Administrative Justice in writing within 48 hours after receipt of the proposed finding and rulings stating the grounds for the objection." Absent a timely objection, the Proposed Order becomes the Order of the Court.

CERTIFICATE OF COMPLIANCE

I the undersigned, counsel to the defendant herein, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision), 16(e) (references to the record), 16(f) (reproduction of statutes, rules, regulations), 16(h) (length of briefs), 18 (appendix to the briefs), and 20 (form of briefs, appendices, and other papers).



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NO. 2015-P-1027

COMMONWEALTH

V.

ADMILSON RESENDE

BRIEF FOR THE DEFENDANT ON APPEAL FROM A JUDGMENT OF THE PLYMOUTH SUPERIOR COURT
